APPELLATE CIVIL.

Before Mr. Justice Piggott and Mr. Justice Walsh.

1917
December, 14.

MOTI CHAND AND OTHERS (PLAINTIFFS) *v.* LALTA PRASAD AND OTHERS (DEFENDANTS).*

Act No. I of 1872 (Indian Evidence Act), section 68—Admissibility of document in evidence—Mortgage-deed not proved, but terms thereof incorporated in a subsequent instrument properly executed and proved.

Where a document, itself legally inadmissible in evidence, was subsequently referred to and partly incorporated in a second document of similar import duly executed between the same parties and registered according to law, it was *held* that the earlier document might be referred to for the purpose of explaining and amplifying the terms of the second, and of arriving at a correct conclusion as to the true nature of the transaction into which the parties had entered. *Fishmongers' Company* v. *Dimsdale* (1) and *Mitchell* v *Mathura Das* (2) referred to.

THE facts of this case are, briefly, as follows :—

The plaintiffs, who were bankers of Benares, had from time to time advanced various sums of money to the defendants, who formed a joint Hindu family consisting of a father, Lalta Prasad, and two sons, Sri Krishn Chand and Jhabbu Lal, carrying on business as saltpetre merchants. In 1909, the parties came to an agreement that the sums advanced should be consolidated and treated as a loan and that the defendants should give the plaintiffs a mortgage on the joint family property as security. Accordingly, on the 15th of May, 1909, a mortgage was drawn up and signed by the two sons, whose signatures were duly attested. At that time, however, the father was not present. He signed the deed subsequently, on the 31st of May, 1909, but his signature was not attested. The deed was registered; but after registration it was discovered that the scribe had incorrectly entered the interest payable as eight annas per cent. *per annum* instead of *per mensem*. The parties thereupon arranged for the execution of a second deed to correct the mistake. This deed was duly executed by all three members of the defendants' family on the 21st of July, 1909, and their signatures were duly attested. It was also registered. This document largely recapitulated the terms of the deed of the 15th of May. The defendants having made default, the plaintiffs instituted a suit for sale based on the

* First Appeal No 225 of 1915, from a decree of Gopal Das Mukerji, Third Additional Subordinate Judge of Aligarh, dated the 15th of April, 1915.

(1) (1852) 13 L. J. C. P., 65 ; 6 C. B., 896.

(2) (1885) I. L. R., 8 All., 6.

mortgage deed of the 15th of May, 1909. At the trial it appeared that one of the attesting witnesses was dead and the other, though present, was not called. The court accordingly held that the mortgage-deed was not proved. But, relying on the deed so far as it might be evidence of a personal liability, it passed a personal decree against all three defendants for the amount found to be due.

The plaintiffs appealed, asking for a decree for sale. During the pendency of the appeal an opportunity was given to the plaintiffs appellants of calling the attesting witness who ought to have been, but was not, examined in the lower court, but he died before he was-examined.

The Hon'ble Sir *Sundar Lal*, the Hon'ble Dr. *Tej Bahadur Sapru* and Pandit *Radha Kant Malaviya*, for the appellants.

The Hon'ble Pandit *Moti Lal Nehru* and Dr. *Surendra Nath Sen*, for the respondents.

WALSH, J.—The facts of this case are remarkably simple, though the questions which have been raised and discussed before us have covered a wide area. The plaintiffs, who brought this suit in the court of the Third Additional Subordinate Judge of Aligarh to enforce a mortgage, or rather, as they alleged, two mortgages, dated respectively the 15th of May and the 21st of July, 1909, carry on business as bankers and commission agents in the city of Benares. The defendants at or about the time carried on business as saltpetre merchants, and were, in the year 1909, obviously in considerable difficulties. Through the medium of an agent or general-attorney of the plaintiffs, one Beni Prasad Dube, it was arranged between the plaintiffs and one of the defendants, Sri Krishn Chand, that, inasmuch as a considerable sums was already due from the defendants to the plaintiffs in respect of commission and other dealings which had taken place between them, the plaintiffs, instead of pressing for payment, should render assistance to the defendants by treating the existing debt as a loan and taking security over their property. The present defendants were members of a joint Hindu family and carried on business together as such, Lalta Prasad being father and Sri Krishn Chand and Jhabbu Lal being the two sons. There was a good deal of delay in the completion of the necessary

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formalities to carry out the transaction, due apparently to some discussion with regard to the amount of the outstanding account between the defendant and the plaintiffs at that date. This, however, is not material, because the amount of the debt was agreed, and there is in fact no dispute as to the substantial effect of the transaction which was entered into. The whole difficulty that has been raised is one of form. A document was prepared by a pleader, which was intended to be a mortgage to carry out the arrangement which had been agreed upon. It was written by a scribe of the name of Makundi Lal, and the plaintiff's general-attorney Beni Prasad, according to his own account, with certain other persons who were to act as witnesses, attended at one of the defendants' places of business in Farrukhabad. The father was absent. It is suggested that he was keeping out of the way on account of the pressure of his creditors. However that may be, it is clear that he was not present on the occasion when the parties met with a view to executing the document, and it was signed only by the two sons above mentioned and by Sheobandhan Dube and Janki Das as attesting witnesses. It was also signed by his own hand by the scribe in the sense that it contained a clause in his own hand-writing stating that he had written the document on the 15th of May. And undoubtedly at one time it was suggested, and one of the grounds raised in the memorandum of appeal was, that if there was any defect in the document by reason of the absence of sufficient attestation, that was cured by the clause containing the signature of the scribe. That argument, however, was not seriously pressed; the scribe's evidence shows that he did not purport to attest and no further reference need be made to it. The document having been thus executed by the two sons, whose signatures are said to have been attested by these two men, Sheobandhan Dube and Janki Das, it appears to have been originally intended to have the document registered in accordance with law as quickly as possible. But the plaintiffs, the mortgagees, required the signature of the father, and the document was sent to him for signature and returned to the son, Sri Krishn Chand, duly signed by the father on the 31st of May, 1909, after a delay of some 13 or 14 days. What happened when the father affixed his signature does not appear. It is, however,

quite clear that his signature was not attested by either of the attesting witnesses to the deed. The document, having been thus executed and registered and being at that time clearly regarded by everybody as a complete, valid and properly executed mortgage-deed in accordance with the strict provisions of the law, was discovered to contain a slip by the scribe. The agreement had been for a rate of interest at eight annas per cent. per mensem, but only eight annas per cent. per annum was provided in the interest clause. It became necessary to correct this blunder, and by consent of every body a fresh deed was entered into on the 21st of July, 1909, with this object. The terms and effect of that deed it will be necessary to consider with some care hereafter. It was duly signed by Lalta Prasad, the father, and by both his sons in the presence of two attesting witnesses. It was duly attested by Janki Das, one of the attesting witnesses to the former deed, and by Makundi Lal the scribe, and it was registered according to law on the 16th of November, 1909. Default having been made, the plaintiffs instituted this suit on the 18th of April, 1914. Substantially there was very little contest about the merits. The main controversy turned upon the question of the attestation and the admissibility of the deed of the 15th of May, 1909. One of the defendants Jhabbu Lal put in no appearance. The other two, the father and one of the sons, admitting their signatures and, denying that the amount entered in the deed was correct, alleged that the deed had not been duly executed and that the signatures had not been attested according to law. The first court held that the document was inadmissible under section 68 of the Evidence Act for the following reasons. At the trial it appeared that Sheobandhan Dube was dead. Janki Das was in court. He was not called. The document was one which was required by law to be attested and no attesting witness, although one was alive, was called, as required by section 68 of the Evidence Act. He had been summoned and was present in court. The expression "called" used in the section clearly means tendered for the purpose of giving evidence. The learned Judge therefore had no alternative but to reject the document, and we agree with the course which he took and with the reason which he gave for so doing. Very little attention,

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judging from the evidence and from the judgement, appears to have been paid to the supplementary or second deed, of the 21st of July, 1909. But, relying on certain authorities which the learned Judge refers to in his judgement, he gave effect to the deed of the 15th of May, 1909, which he had rejected as inadmissible as a mortgage as evidence of a covenant to pay, and passed a personal decree against all three defendants for the amount due. Thereupon an appeal was brought to this Court by the plaintiffs, challenging the decision upon three grounds.

1. That the execution of the deed had been proved;
2. That the evidence of the scribe who had in fact been called was sufficient as that of an attesting witness; and
3. That the learned Judge had not properly weighed the evidence.

There was a difficulty in serving the respondents with the notice of appeal. Ultimately substituted service was ordered by means of advertisement in the newspapers, and, whether or not they had knowledge of the proceedings, they did not in fact appear, although the order for substituted service was duly carried out, at the hearing of the appeal which was opened before my brother PIGGOTT and myself on the 29th of March, 1917. During the discussion in the opening of the appeal it was pointed out, amongst other things, that there was some difficulty in appreciating the grounds upon which the learned Judge had given effect to the deed as a covenant to repay the money, while rejecting it as inadmissible under section 68, and it was urged upon us with some force that if the failure of the suit resulted from the omission to call Janki Das during the trial, that was an omission which might, subject to certain penalties, be repaired without injustice to the defendants, if we were to afford an opportunity to the plaintiffs of producing him as a witness in this Court. We made an order on the 29th of March, 1917 in the following terms:—"Without discussing further the question of law raised by this appeal, we think it sufficient to say that, under the circumstances, the appellants are entitled to an opportunity of producing before this Court for examination the witness Janki Das, who should perhaps have been produced by them in the court below. Assuming that the appellants are prepared to

deposit the necessary fees and expenses, we order that this case be put up on any near convenient date, and summons to issue for the attendance of the said witness, Janki Das, son of Khiali Ram, caste Mahajan, resident of muhalla Mufti Saheb, in Farrukhabad, in this Court on such date." Difficulties arose in carrying out that intention owing to the illness of Janki Das. Adjournments were applied for from time to time, which were granted in the hope that the whole thing might be settled by hearing the evidence of this witness, who might have been tendered in the court below. Unfortunately, the witness got worse and died, and it was therefore, impossible for the appellants to call him. The case, therefore, came on for re-hearing before us in the condition in which it was, when it was originally opened before us in appeal, with the addition which we had made by the order we passed on the 29th of March, 1917. On this occasion the respondents put in an appearance, and several questions have been argued in attack upon and in support of the decision of the court below. The real question which we have to decide is whether in fact the plaintiffs, in the events which have happened, have been able to establish by legal evidence the execution in their favour of a mortgage for this debt over the property of the defendants, and whether they are entitled to an order enforcing it in this suit. Now it is abundantly clear that the loan was made, that it was obtained by the defendants offering a substantial and valuable security, that the money is still due, and that the defendants have no merits of any kind. The case is an illustration of the pitfalls which the prudent provisions of the Legislature made for the protection of ignorant and foolish persons may possess for the ordinary men of business and the use that knaves may make of them. There are in evidence, some copy of letters, dated one of the 19th of May, 1909, and two each of the 1st of June, 1909. These, if genuine, are conclusive as to one material fact in dispute, namely, the attestation of the father's signature. Due notice to produce the originals of these letters was given to the plaintiffs through the Court on the 25th of January, 1915. Beni Prasad, the general-attorney of the plaintiffs, was cross-examined with a view to explaining the absence of the originals, which were not forthcoming. He

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explained that after some short period it was the practice in the plaintiff's business to weed out and destroy letters, and the topic was pursued no further. Clear notice was given to the plaintiffs of the existence of these letters. They were called upon to produce them, and the defendants were entitled to use their copies. We have examined the defendants' press copy letter book, in which these copies are contained. It is, relatively speaking, well kept and we are both satisfied that it is a genuine book.

These copy letters show three things. Firstly, that, after being written out the day before, the document of the 15th of May, 1909, was signed by the two sons and attested by Sheobandhan Dube, if not by Janki Das, but that on the 19th of May, the father had not signed it. Secondly, that registration was delayed until after the 31st of May, 1909, when the document was received back by Sri Krishn Chand from his father with the father's signature upon it, and that, if the plaintiffs had not insisted upon the father's signature, the defendants would have registered the document without it, regarding the execution as then complete, and, thirdly, that the defendants were in need of money, that they were in profound misery, that their honour was in jeopardy and that they were anxious to do all they could to complete the security.

What happened at the trial as to the failure to call the attesting witness has been clearly stated in the judgement of the first court and has already been referred to above. The only living attesting witness was present in court and was deliberately not called. This fact alone prevents the document by virtue of the provisions of section 68 of the Evidence Act from being "used as evidence," and if the plaintiffs' case rested upon the document of the 15th of May alone, it must fail. We see no escape from this conclusion.

It was urged that the events which happened in this Court on the 29th of March, 1917, and the death of the missing witness have removed this case from the operation of section 68. We cannot agree with this view. We ordered that the plaintiffs appellants should be given an opportunity of producing the witness. It seems to us that that order had none of the attributes

of finality. It was made at an *ex parte* hearing. The respondents ought not to be allowed to improve their position by the fact of their absence. But it appeared to us that, apart from the debatable point as to whether the learned Judge ought, in the circumstances, to have given a decree for the principal money at all, it was possible that the omission of the plaintiffs in the first court was a mere error of judgement which it was not too late to repair, and that by allowing them to repair it justice might be done by penalizing them by some order in respect of costs for their error. But it now appears perfectly clear that their act in refraining from calling Janki Das was due to their deliberate decision as to the conduct of their case. The letters of the 19th of May, and the 1st of June, 1909, though on the file, had not been printed in this Court's book and had unfortunately been ignored in the judgement of the first court and had not been considered relevant by the appellants in their presentation of the evidence. When we made the order of the 29th of March, 1917, we had no notion of their existence. They now make it plain that the plaintiffs' general-attorney endeavoured to prove the due attestation of the document of the 15th of May, by the grossest perjury. He swore that the signatures of the father and the two sons were affixed in his presence and in that of Janki Das, Sheobandhan Dube and the scribe. "Jhabbu Lal," he said, "read the document and the other defendants (that includes the father, there can be no mistake about it) heard it." The fact is that the father was not there. Further he said in cross-examination "nobody signed the document on the day it was written. The signatures of the witnesses and the executants were affixed on the following day. Lalta Prasad was not present on the day the document was written. He came the next day, and the signature was affixed on the same day." These statements are clearly deliberate falsehoods. Moreover, the evidence of Beni Prasad made an unfavourable impression upon the learned Subordinate Judge who was not inclined to believe that Beni Prasad was present even when the document was signed by the sons, and in this conclusion he is very likely correct. Makundi Lal was even more specific both in examination-in-chief and in cross-examination. He lied with elaborate and vivid

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detail and identified Janki Das as having attested all the three signatures on the same afternoon. He described in minute detail the process of execution and stated that Lalta Prasad affixed his signature first of all.

What the condition of Janki Das's mind may have been it is idle to speculate, but he could not, if called, have stated what the contemporaneous documents now show to have been the facts, without destroying the plaintiffs' case and casting discredit upon both their general attorney and the scribe. Had we known on the 29th of March, the real state of the evidence on the record, it is unlikely that we should have granted any indulgence to the plaintiffs who had conducted their case with such materials. We think it was open to this Court at any time to hear further argument and finally to refuse to allow additional evidence to be given. Our previous order, made by us under a misapprehension, cannot be used to enable the plaintiffs to avail themselves of section 69. We hold, therefore, that the document of the 15th of May cannot be used in evidence in the sense contemplated by section 68, that is to say, as a mortgage which is required by law to be attested and has in fact been attested.

The three letters to which I have referred further show that the document was not in any case duly attested, one of the signatories having clearly signed it at another place and on some date subsequent to the attestation by the only witnesses who are alleged to have attested. It was urged with great force by Sir *Sundar Lal*, on behalf of the appellants, that it might be treated as a document duly signed, attested and executed by two members of a joint Hindu family dealing with joint family property and that the consent of the remaining member of the family, in this case the father who alone could object, could be proved by any method known to the law. Speaking for myself I do not think it necessary to decide whether this contention is sound or not because in either view the provisions of section 68 not having been complied with, the document cannot be used as evidence at all as a document either requiring attestation or in fact attested.

But this does not, in the events which have happened, prevent it from being used in evidence as something else or for

any other purpose. It is obvious that section 68 is subject to some limitation, *e. g.* if the document were tendered in some other proceeding for the purpose of proving the hand-writing of the scribe, it could not seriously be objected to upon the ground that, no attesting witness being called to prove it, it could not be used in evidence at all. The second deed of the 21st of July as I have pointed out, was signed by all the parties to the transaction in this suit, and was duly attested and duly registered. It treated the document of the 15th of May as a valid mortgage-deed and repeated some, at any rate, of its stipulations as being the terms which were to govern the new contract. We think it quite clear that we are entitled to look at the document of the 15th of May identified by reference, as it clearly is, in the document of the 21st of July, in order to ascertain what these stipulations were. If they had been contained in some other kind of document, clearly identified, to which the parties agreed that reference should be made for the purpose of interpreting their rights and obligations, such a document would clearly be made admissible by the act and contract of the parties, even though as an independent legal document it was itself inadmissible. It derives its admissibility from another source which binds the parties. This would apparently be so according to English law, under what is described in Taylor on Evidence as the sixth exception to the rule of inadmissibility due to the absence of an attesting witness, if the party objecting to it took some benefit from the latter document which treated the earlier one as valid. This is not the case here: the party objecting clearly undertook a greater burden. But I think, in truth that it is not really an exception to the rule at all, but merely an illustration of a document to which the rule in England is inapplicable, and that the rule in India, that is to say, section 68, is equally inapplicable in the present case for the purpose of deciding whether the earlier document is admissible as a document to which the parties have referred otherwise.

The case before us on this point bears a remarkable similarity to the case of *Fishmongers' Company* v. *Dimsdale* (1). In that case the decision of the Chief Justice TINDAL, as reported in the

(1) (1852) 18 L. J. C. P., 65C, ; 6 C. B., 836.

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statement of facts at page 57 of the Law Journal Report, is precisely the objection now raised to the admissibilityof the document of the 15th of May, but an exceptionally strong Court of the Exchequer Chamber overruled this objection and held that the document was admissible. The case occurred before the Common Law Procedure Act of 1864, and the rule of law which had to be dealt with, namely, with regard to the necessity of calling a subscribing witness in order to render a document admissible at all, in substance did not differ from section 68. Baron PARKE in giving judgement gave as the reason, that the memorandum endorsed, which corresponds in this case to the document of the 21st of July, incorporated the original agreement. I prefer the judgement of COLERIDGE, J., as reported in the Law Journal Report, who added his own reason in these words :—"There is a complete identification by words of reference." It is somewhat remarkable that when a similar case arose at a later stage with reference to its admissibility having regard to the stamp, the Chief Justice was overruled for treating the earlier document as incorporated thereby, following the dictum of PARKE, B (*vide* 22 L. J., C. P.). But the principle is clear, although the language in which it is expressed in the published report of the judgement may not be scientifically accurate, and we find it difficult to draw any distinction between that case and the case before us. We are referred to a further decision which is also very much in point. In 1885, in the case of *Mitchell* v. *Mathura Das* (1), which went to the Privy Council, the question arose as to the due registration of a deed of conveyance. There had been an earlier deed of 1870, which was not registered. The transaction was sought to be carried out and put in force through a subsequent deed, namely of 1878, which, no doubt, did a little more than the document of the 21st of July does, actually re-affirmed and repeated in its entirety the deed of 1873, referring to it in express terms and setting it out in a schedule as part of itself, namely, the deed of 1878. When presented for registration, the memorandum of registration was written not on the first sheet, but at the end of the deed which was annexed as a schedule to the deed of 1878. I take that statement from the judgement of Sir BARNES PEACOCK, on p. 10 and it would appear from that, that the deed of 1873 had actually been copied out or itself annexed

(1) (1885) I.L.R., 8 All., 6.

as a schedule to the subsequent deed of 1878. But there can be no difference in principle whether the document is incorporated by actual physical annexation, or by reference in unmistakable terms of identification. The High Court in that case had held that the registration was insufficient because the latter document had not been registered and the endorsement upon the deed in the schedule being upon a document which in itself could not be proved, could not be looked at. The Privy Council overruled that contention in these words:—(p. 11) "That document (that is, referring to the earlier document) was not proved. It could not be proved because it could not be given in evidence. But the fact that the deed itself could not be given in evidence was no reason why the deed of 1878 should not be given in evidence and that deed (referring to the deed of 1873) was proved to have been executed and duly registered." That language covers, in our view, in almost express terms, the point raised in this case, namely, as to whether the document of the 21st of July, having been duly executed and attested does not in sufficient terms refer to the earlier document, which was inadmissible in itself, so as to make it admissible as part of the latter document.

The question of interpretation remains. This of course is totally distinct from the question of admissibility. What is the effect of these two documents, bearing in mind that we are not entitled to treat the document of the 15th of May, as a mortgage at all or even as a document in itself binding upon the parties for anything? On the whole we think that the document of the 21st of July, 1909, hypothecates the property described in the specification, for interest at eight annas per cent. per mensem on the sum of Rs. 32,914-3-9, from the 15th of May, 1909. We also think, although we feel some doubt about it, that it sufficiently hypothecates the property for the principal sum. It clearly repeats or incorporates the clauses in the deed of the 15th of May, which relate to interest. It says "we shall pay interest on the debt due to the Babu Sahibs, at Rs. 6 per cent. per annum, which is equal to eight annas per cent. per mensem, in accordance with the stipulation laid down in the aforesaid mortgage deed." The document must, at any rate, therefore be

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construed as having contained within it, in express terms, at least clauses 1, 2 and 3 of the document of the 15th of May. Clause 2 provides that if the interest is not paid within 6 months the executants shall be liable to pay compound interest at eight annas per cent. per mensem, and further that, (after fulfilment of certain provisions which involve a reference to the body of the document to ascertain the meaning of the words "the above term,") "the said Babu Sahibs will be at liberty to recover the entire amount payable to them by taking proper proceedings, from our person, the property mortgaged and other property, movable as well as immovable, belonging to us, the executants." The indebtedness for the principal is clearly acknowledged by the deed of the 21st of July, and we find it difficult to give effect to clauses 1, 2 and 3, which are thus clearly incorporated and accepted in the document of 21st of July, as governing the payment of interest together with the consequences for non-payment without also giving effect to those parts of them which govern the payment of the principal. The two are indissolubly connected. The property mortgaged is clearly specified in the later document of the 21st of July: clause 2 can only mean that a power of sale is to be exercised by the Babu Sahibs for non-payment, and clause 3 refers to realization, which can only be read having regard to the provisions of clause 2 as meaning sale. The terms of section 58 defining a mortgage are:—"A mortgage is the transfer of an interest in specified immovable property for the purpose of securing an existing debt." "Where a mortgagor binds himself personally to pay the mortgage money and agrees expressly or impliedly that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the property to be sold and the proceeds of sale to be applied in payment of the mortgage-money, the transaction is called a simple mortgage." We think that that is what all three executants impliedly did when they signed the document of the 21st of July. Their intention is obvious. The only doubt is as to whether they carried it out. It was unnecessary that they should repeat in express terms all that they had agreed to in the previous transaction, for both parties treated the previous deed as binding upon them, but it

so happens that out of extra precaution they did repeat and reiterate those terms which we have mentioned and thereby impliedly gave the mortgagee a power to sell not only for the new rate of interest but for the principal. A mortgage need not be contained in one or any other particular number of documents. It may be collected from a variety of documents so long as the effective document is a duly signed, attested and registered instrument in accordance with section 59 of the Transfer of Property Act. We think that this is the real legal effect of the document which was duly executed and attested on the 21st of July, and that therefore the plaintiffs are entitled to succeed in this suit upon that ground. It is not the ground upon which the case was first launched in the plaint, nor upon which the case was fought in the first court, nor is it the ground upon which the plaintiffs by their memorandum of appeal sought relief in this Court, but we think it is the ground which gives effect to the real transaction between the parties, and which does substantial justice in spite of the mistakes the plaintiffs have made. The plaint and the memorandum of appeal must be treated as having been duly amended for the purpose of raising the claim in this form based upon the subsequent document of the 21st of July, 1909. But we do not think that the omission by the plaintiffs in the conduct of their suit ought to stand in the way of our doing what nobody can doubt is substantial justice in the case.

On the other hand we feel it impossible to pass by without marking our sense of the conduct of the plaintiffs in presenting their case to the trial court. As one would expect, no attempt has been made by their representatives in this Court to defend or justify it. We think that so far as that is concerned, the justice of the case will be met by altering the decree of the court below and giving them a decree for sale of the mortgaged property without costs either of the suit or of this appeal.

PIGGOTT, J.—I agree generally. The only difficulty I have felt is with reference to the principal of the mortgage debt. I may put my point in this way: as regards the interest at six per cent. per annum it seems to me that, when the parties entered into the contract embodied in the agreement of the 21st of July, 1909, it was a definite part of the intention of the executants of

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that document to charge the extra rate of interest on the property which they conceived to have been already mortgaged by the deed of the 15th of May. They may have done this only by way of extra precaution; but on the terms of the deed of the 21st of July, 1909, even considered by itself alone, it seems to me that a hypothecation of the property specified at the foot for payment of the interest therein covenanted for is made by necessary implication. If the intention of the parties had been otherwise, I do not believe there would have been any specification of the property in this deed at all. As regards the principal my difficulty is this, that the parties conceived themselves to have alreday effected a valid mortgage of the same property as security for the repayment of this principal, and it was presumably no part of their intention on the 21st of July, 1909, to make a fresh hypothecation for that purpose. At the same time I agree with what has been said as to the anomaly of drawing any distinction between the effect of the transaction of the 21st of July, in respect of the principal and its effect as regards the interest. Broadly speaking, what the law requires is a registered instrument, duly executed and attested, in order to effect a mortgage; we have such an instrument before us in the so-called agreement of the 21st of July, 1909. I think that we are entitled to read it in connection with the earlier document to which it refers, and that the results stated in the judgement of my learned colleague necessarily follow.

BY THE COURT.—We allow this appeal and direct that in lieu of the simple money-decree passed by the court below a decree for sale be drawn up in the proper form in respect of the property specified in the plaint. Interest must be calculated at the rate of six per cent per annum on the amount claimed up to the date fixed for payment, which we hereby fix at six months from this date. The decree will embody the usual provisions as to the consequences of payment or non-payment on the part of the judgement-debtors, and the same decree will carry future interest at six per cent per annum from the date fixed for payment until realization. For reasons which we have already stated we leave the parties to bear their own costs in both courts

Appeal allowed.